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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ATARI INTERACTIVE, INC.,

Plaintiff,

v.

REDBUBBLE, INC.,

Defendant.

Case No. 4:18-cv-03451-JST

**DEFENDANT REDBUBBLE, INC.'S
OPPOSITION TO ATARI'S MOTION TO RE-
TAX COSTS**

Date: March 17, 2022

Time: 2:00 p.m.

Ctrm: 6 – 2nd Floor

Judge: Honorable Jon S. Tigar

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	1
A. The Court Should Resolve Redbubble’s Bill of Costs Now	1
B. Redbubble’s Costs for Visual Aids Are Compensable Because They Were Reasonably Necessary to Assist the Jury in Understanding the Issues at the Trial	2
1. Point Multimedia’s preparation of trial graphics and demonstratives is compensable	2
a. The hours spent by Point Multimedia were reasonably necessary	2
b. Redbubble’s request for costs does not include non-compensable time discussing graphics	5
2. Brian Lee’s preparation of trial graphics and demonstratives, as well as his time spent as an in-court technician, are compensable	7
III. CONCLUSION	8

TABLE OF AUTHORITIES

Page(s)

Cases

<i>ASIS Internet Servs. v. Azoogole.com, Inc.</i> , 357 F. App'x 112 (9th Cir. 2009).....	2
<i>ASIS Internet Servs. v. Optin Glob., Inc.</i> , No. C-05-5124 JCS, 2008 WL 5245931 (N.D. Cal. Dec. 17, 2008)	1
<i>Competitive Techs. v. Fujitsu Ltd.</i> , No. C-02-1673 JCS, 2006 WL 6338914 (N.D. Cal. Aug. 23, 2006).....	2
<i>Emblaze Ltd. v. Apple Inc.</i> , No. 5:11-CV-01079-PSG, 2015 WL 1304779 (N.D. Cal. Mar. 20, 2015).....	2, 6, 7
<i>Golden Bridge Tech., Inc. v. Apple Inc.</i> , No. 5:12-CV-04882-PSG, 2015 WL 13427805 (N.D. Cal. Dec. 21, 2015), <i>aff'd</i> , 673 F. App'x 1010 (Fed. Cir. 2017)	7
<i>Hilton v. Braunskill</i> , 481 U.S. 770, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).....	1
<i>Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole</i> , 2004 WL 557388 (N.D. Ill. March 22, 2004).....	6
<i>Perry v. U.S. Dep't of Energy</i> , No. 05 C 3634, 2008 WL 161679 (N.D. Ill. Jan. 14, 2008)	6
<i>Shum v. Intel Corp.</i> , 682 F. Supp. 2d 992 (N.D. Cal. 2009), <i>aff'd</i> , 629 F.3d 1360 (Fed. Cir. 2010).....	4, 7

1 **I. INTRODUCTION**

2 Plaintiff Atari Interactive, Inc. (“Atari”) sued Defendant Redbubble, Inc. (“Redbubble”) for
3 copyright infringement, trademark infringement, and trademark counterfeiting. On November 4, 2021,
4 the jury reached a verdict for Redbubble on all claims.

5 On December 20, 2021, Redbubble filed its bill of costs, requesting \$242,874.98. On January 18,
6 2022, Atari objected to Redbubble’s costs for its trial graphics, demonstratives, and in-court technician.
7 On January 28, 2022, Redbubble filed its reply. To address Atari’s concerns that Redbubble’s costs
8 included time for discussions about visual aids rather than actual preparation of visual aids, Redbubble
9 also reduced its request for visual aids costs from \$226,671.54 to \$208,824.04 by excluding any time
10 entries that included the word “discussed.” Redbubble also submitted a declaration from Greg Glass,
11 who owns the trial consulting firm and prepared the invoices in question, stating that the remaining
12 entries were for actual preparation of visual aids. On February 1, 2022, the Clerk taxed costs in the
13 amount of \$172,429.38. The same day, Atari also lodged objections to the Glass declaration. On
14 February 8, 2022, Atari filed a motion to re-tax costs, reiterating its objections to Redbubble’s visual aids
15 costs.

16 The Court should deny the motion. Redbubble’s costs are compensable because high-quality
17 graphics were reasonably necessary to assist the jury in understanding the numerous complex issues in
18 the case, including sorting through the nearly 3,000 products that Atari alleged as infringing in its
19 Complaint.

20 **II. ARGUMENT**

21 **A. The Court Should Resolve Redbubble’s Bill of Costs Now**

22 The Court should reject Atari’s request for a stay pending its appeal on the merits and resolve
23 Redbubble’s bill of costs now. In deciding whether to grant a stay, courts consider: “(1) whether the
24 stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the
25 applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially
26 injure the other parties interested in the proceeding; and (4) where the public interest lies.” *ASIS Internet*
27 *Servs. v. Optin Glob., Inc.*, No. C-05-5124 JCS, 2008 WL 5245931, at *1 (N.D. Cal. Dec. 17, 2008)
28 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)), *aff’d sub nom.*

1 *ASIS Internet Servs. v. Azoogole.com, Inc.*, 357 F. App'x 112 (9th Cir. 2009).

2 Atari makes no argument that it will be irreparably or substantially injured by paying costs now.
 3 On the other hand, deciding these issues now permits any appeal of fees and costs to be consolidated with
 4 the appeal on the merits. *See Emblaze Ltd. v. Apple Inc.*, No. 5:11-CV-01079-PSG, 2015 WL 1304779,
 5 at *3 (N.D. Cal. Mar. 20, 2015) (“Deferring judgment [on the bill of costs] at this point also would
 6 increase the burden to the Federal Circuit by presenting a possible second appeal.”). Thus, “courts in this
 7 district have repeatedly denied requests to stay taxation of costs.” *Id.* Atari has not shown that a
 8 departure from this practice is warranted here.

9 **B. Redbubble’s Costs for Visual Aids Are Compensable Because They Were**
 10 **Reasonably Necessary to Assist the Jury in Understanding the Issues at the Trial**

11 “The cost of preparing charts, diagrams, videotapes and other visual aids to be used as exhibits is
 12 allowable if such exhibits are reasonably necessary to assist the jury or the Court in understanding the
 13 issues at the trial.” L.R. 54-3(d)(5).

14 **1. Point Multimedia’s preparation of trial graphics and demonstratives is**
 15 **compensable**

16 Atari objects to Point Multimedia’s invoices, contending the Court should deny these costs in
 17 their entirety. Courts in this district have awarded costs for graphics and demonstratives as permissible
 18 visual aids. *See, e.g., Emblaze* 2015 WL 1304779, at *6 (awarding \$66,005.00 for trial graphics and
 19 demonstratives because “[t]his case is exactly the type of complex litigation that requires high-quality
 20 demonstratives for the edification of the jury”); *Competitive Techs. v. Fujitsu Ltd.*, No. C-02-1673 JCS,
 21 2006 WL 6338914, at *9 (N.D. Cal. Aug. 23, 2006) (awarding \$133,003.09 in costs for demonstratives
 22 used at a Markman hearing, tutorial, and summary judgment hearing).

23 **a. The hours spent by Point Multimedia were reasonably necessary**

24 Atari first argues that Redbubble’s trial graphics were not reasonably necessary, and that Point
 25 Multimedia’s 526 hours spent on preparing these graphics are “facially unreasonable.” Atari’s Motion
 26 for Review of Taxation of Costs, Dkt. No. 285 (“Mot.”) at 2.¹ Not so. Atari made this case a
 27

28 ¹ Atari does not contest that Point Multimedia’s hourly rate of \$295 per hour was reasonable.

1 referendum on Redbubble’s business model. Atari’s complaint attached images of nearly 3,000 products
2 listed on Redbubble’s website. At trial, Atari alleged that Redbubble sold 92 different types of goods and
3 requested \$5 million in damages. The jury faced the challenging task of having to understand, for each
4 product listing, among other things: whether Atari was alleging the listing infringed (to which Atari’s
5 witnesses and lawyers sometimes gave different answers), whether Atari had a copyright registration
6 covering the image (if a copyright), what types of goods an image was offered on and whether those
7 types were listed in the relevant trademark registration (if a trademark), and whether a particular image
8 was a fair use. The jury was also shown evidence regarding how artists and purchasers sign up and use
9 Redbubble, how fulfillers come to manufacture the physical products, and how Redbubble deals with
10 takedown notices.

11 For the jury to sort through this evidence and render an informed verdict, high-quality visual aids
12 were a necessity. For example, Redbubble’s counsel showed Ms. Brown mock-ups of t-shirt designs that
13 it created for demonstrative purposes, varying different aspects of a design to pose questions about
14 infringement and fair use. *See, e.g.*, Trial Tr. 527:10-529:25 (questioning Ms. Brown about
15 demonstratives ranging from a t-shirt with the plain word “Asteroids,” to one with a wall socket and
16 possibly Asteroids-ship-like triangle, to one with a Houston Astros inspired “Astoroids” design). These
17 original designs were created by Redbubble’s trial graphics team at Point Multimedia. Redbubble’s trial
18 graphics were equally important in its opening and closing. For example, in opening, Redbubble walked
19 through the process of buying or selling art on Redbubble, which was of central importance in the case.
20 In closing, Redbubble showed the jury in visual form how many of the nearly 3,000 product images Atari
21 attached to its complaint Atari had actually accused of infringement, then went through those images by
22 visually demonstrating the relevant issues of types of goods, copyright registrations, evidence of the
23 copyrighted work, and fair use, as they applied to varying subsets of those images.

24 Atari asserts that “the types of demonstratives to which Redbubble refers did not demand in
25 excess of 500 hours to create.” Mot. at 4. Atari characterizes the graphics created by Redbubble’s artists
26 as “PowerPoint slides with a few assets apiece” and argues that Redbubble now “dresses up its
27 descriptions of these demonstratives.” *Id.* The Court should reject Atari’s suggestion that the measure of
28 visual demonstratives is their quantitative complexity. The goal of visual aids is to make the case

1 *simpler* for the jury, not to overwhelm it with complexity or clutter. That is why visual aids are
2 compensable costs when “reasonably necessary to assist the jury or the Court in understanding the issues
3 at the trial.” L.R. 54-3(d)(5). And as is true in writing, it often requires more time and effort to develop
4 concise visual aids that are easy to digest at a glance. It is therefore no surprise that illustrations that may
5 appear uncomplicated—such as the baseball-referencing “Astoroids” t-shirt mockup—were time-
6 consuming to create, requiring successive iteration, elimination of extraneous features, and rejection of
7 possible alternatives. Moreover, Atari ignores that Redbubble also made use of demonstratives that used
8 literally *thousands* of assets in a slide. Take the animated sequence in closing that visually sorted the
9 nearly 3,000 accused products into different categories: That sequence required the artists to carefully
10 insert and animate each of those 3,000 corresponding images. Thus, while it may have only lasted a few
11 short minutes in closing, it required many hours to render in a manner that was accurate and conveyed
12 useful information to the jury—such as showing how many products actually matched the types of goods
13 in Atari’s trademark registrations.

14 Atari also objects to Point Multimedia’s time entries as insufficiently detailed, pointing to entries
15 such as “Mr. Kent Bell developed graphics per the direction of Ms. Daralyn Durie, Mr. Joseph Gratz, Ms.
16 Allyson Bennett, Ms. Moon Hee Lee, and Mr. Matthaeus Martino-Weinhardt.” Atari contends that
17 “missing is any indication as to *which* graphics were developed and *for what* purpose,” Mot. at 3, but
18 cites no authority suggesting that level of granular detail is required to recover costs for visual aids.
19 Atari’s contention also ignores the reality that for a trial, graphics might be combined, revised, split up,
20 and repurposed, such as from cross-examination to closing argument, all in rapid succession. The level
21 of billing detail Atari demands is neither practical nor required to determine whether the graphics were
22 reasonably necessary to aid the jury.

23 It is also unclear what “purposes” Atari contends are non-compensable for graphics. To the
24 extent Atari suggests that only graphics actually shown to the jury are compensable, courts in this district
25 have rejected that argument and have awarded costs of preparing demonstratives if prepared in
26 anticipation of trial, even for those not ultimately used at trial. *See Shum v. Intel Corp.*, 682 F. Supp. 2d
27 992, 1000 (N.D. Cal. 2009), *aff’d*, 629 F.3d 1360 (Fed. Cir. 2010) (“Shum’s further objection that there
28 should be no recovery for demonstratives that are not proven to have been used at trial is incorrect as a

1 matter of law. The Local Rule allows recovery for materials ‘to be used’ at trial. It does not require
2 actual use of each item so prepared.”).

3 In sum, Redbubble’s high-quality graphics were necessary to help guide the jurors in interpreting
4 and organizing the large quantities of evidence they were asked to consider in this trial. The hours spent
5 by Redbubble’s trial graphics team were necessary in turn to create those graphics.

6 **b. Redbubble’s request for costs does not include non-compensable time**
7 **discussing graphics**

8 Atari also speculates that “[t]he time entries suggest that meetings and discussions occurred
9 between Redbubble’s counsel and graphics technicians” because most time entries state that graphics
10 were prepared “per the direction” of Redbubble’s counsel. Mot. at 4. Atari’s speculation is unwarranted.
11 The time entries stating that a Point Multimedia artist “developed” trial exhibits or graphics “per the
12 direction of [individuals]” are for time spent on their physical preparation while sitting at the computer
13 screen, not meetings about the trial exhibits or graphics. *See* Declaration of Greg Glass (“Glass Decl.”),
14 Dkt. No. 281-1, ¶ 3. These entries state that the graphics were developed at the direction of certain
15 attorneys only to identify *who* requested the graphics. They do not include non-compensable meeting or
16 discussion time. Where Point Multimedia billed time for meetings or discussions, the time entries
17 expressly use the word “discussed.” *Id.* ¶ 4.

18 In response to Atari’s concerns regarding meeting time, Redbubble in its reply withdrew its
19 request for costs as to any Point Multimedia time entries that include the word “discussed.” These were
20 highlighted in Exhibit A to the Declaration of Greg Glass and totaled 60.5 hours at \$295/hour. Dkt. No.
21 281-2. Redbubble thus already reduced its request for visual aids costs from \$226,671.54 to \$208,824.04
22 to address Atari’s concerns.²

23 Atari objects to Mr. Glass’s declaration because it was submitted with Redbubble’s reply.
24 Redbubble submitted the declaration with its reply to rebut Atari’s objection that Redbubble was seeking
25 recovery for discussions about trial graphics rather than the preparation of the graphics themselves.

26
27 ² In taxing costs, the Clerk further reduced Redbubble’s request for visual aids by around 25%. Atari
28 acknowledges the reduction but nevertheless maintains that the Court should “strike Redbubble’s
requested costs related to visual aids” in their entirety. Mot. at 7.

Local Rule 54-2 requires the parties to meet and confer regarding objections to the bill of costs only *after* the bill of costs is filed, so Redbubble could not reasonably have anticipated Atari's objection. Furthermore, the Local Rules expressly contemplate the submission of further declarations after a party files its bill of costs, providing that "[t]he Clerk may require further affidavits and documentation as necessary to determine allowable costs." L.R. 54-4(a). Courts in this district have thus rejected arguments that supplemental documentation was untimely. *See Emblaze*, 2015 WL 1304779 at *6 ("Although the parties dispute the timeliness of Apple's submission of certain invoices in camera for review, the court has no problem with Apple's good-faith attempt to provide the court with all information necessary to make a reasoned determination about whether to tax costs.").

Atari also objects that Mr. Glass lacks personal knowledge about the time entries and merely "talked to his employees, and now offers their out-of-court statements for the truth of the matter asserted" in violation of the hearsay rule. Mot. at 5. Not so. Mr. Glass's declaration regarding the content of the bills is based on his own, first-hand knowledge as the person who "personally created and reviewed each of Point Multimedia's bills in this case," and—as owner of Point Multimedia—is most familiar with its billing and timekeeping practices. Glass Decl. ¶ 2. Mr. Glass "was in close contact with the Point Multimedia artists who created trial exhibits and demonstratives for Redbubble in this case" during the trial, so he prepared and reviewed bills based in part on his observations of and conversations with his artists about their work. *Id.* His testimony about the meaning of time entries is based on his personal knowledge, not on assertions made to him by others, so it is not hearsay. And, in any event, courts have held that "hearsay submissions are permissible to support a bill of costs." *Perry v. U.S. Dep't of Energy*, No. 05 C 3634, 2008 WL 161679, at *2 (N.D. Ill. Jan. 14, 2008); *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, No. 00 C 7620, 2004 WL 557388 *4 (N.D. Ill. March 22, 2004) (overruling hearsay objection to affidavit in support of bill of costs).

Finally, Atari argues it is "simply not believable" that these time entries would not include discussions about trial graphics (as opposed to preparation of the graphics), because Point Multimedia did not bill time for discussions or meetings during the trial. Mot. at 5. Atari has no basis for disputing Point Multimedia's time entries as explained by Mr. Glass. Of course, Redbubble's attorneys and trial graphics artists spent time in team meetings discussing the graphics during the trial, but that time is not

1 included on its bill of costs. Atari questions when an artist who worked long hours on a given day would
 2 have had time to take direction from Redbubble without billing meeting or discussion time, Mot. at 5-6,
 3 but trial days are long, and once the basic direction was provided, the trial graphic artists were given
 4 substantial latitude to develop graphics consistent with that direction.

5 **2. Brian Lee’s preparation of trial graphics and demonstratives, as well as his**
 6 **time spent as an in-court technician, are compensable**

7 Redbubble’s bill of costs also includes the time spent by its technician, Brian Lee of Impact Trial
 8 Consulting, who both assisted in preparing graphics and demonstratives and was the in-court technician
 9 who actually displayed them during trial. Courts in this district have regularly awarded costs for in-court
 10 technician time. *See, e.g., Emblaze*, 2015 WL 1304779, at *7 (“As a rule, in complex patent litigations in
 11 this district, the in-court technician time and the equipment costs associated therewith are permitted when
 12 the Court acknowledges that the demonstratives could not have been presented without the appropriate
 13 technical resources.” (cleaned up)); *Golden Bridge Tech., Inc. v. Apple Inc.*, No. 5:12-CV-04882-PSG,
 14 2015 WL 13427805, at *3 (N.D. Cal. Dec. 21, 2015), *aff’d*, 673 F. App’x 1010 (Fed. Cir. 2017)
 15 (“[T]hese demonstratives did not present themselves, and so Apple also may recover the costs for the in-
 16 court technician time and the equipment necessary to present the demonstratives.” (cleaned up)); *Shum*,
 17 682 F. Supp. 2d 992 at 1000 (awarding around \$24,000 for in-court technician time).

18 Courts have sometimes reduced these awards to only the in-court time of a technician, reasoning
 19 that “the court cannot determine exactly what the technician was doing” during other hours. *See*
 20 *Emblaze*, 2015 WL 1304779, at *7. However, for this trial, Mr. Lee not only served as Redbubble’s in-
 21 court technician, but also performed tasks like those performed by Point Multimedia’s team—preparing
 22 graphics and demonstratives. *See* Declaration of Matthaeus Martino-Weinhardt, Dkt. No. 266-1 at ¶ 5.b.
 23 Accordingly, his time spent providing on-site support (but not in court) was also reasonably necessary to
 24 the presentation of visual aids to the jury. In the alternative, should the Court determine that only Mr.
 25 Lee’s in-court hours while trial was in session are compensable, Redbubble agrees that would total 28.5
 26 hours. *See* Mot. at 6 & n.3.

27 Atari also argues that Mr. Lee’s charges for equipment, meals, and air fare should be disallowed,
 28 Mot. at 7 n.4, but Redbubble excluded those charges from its bill of costs from the very beginning,

1 including only the \$44,038.75 for hours spent preparing or presenting visual aids. *See* Dkt. No. 266-2 at
2 2, 18.³

3 **III. CONCLUSION**

4 For the foregoing reasons, the Court should deny Atari's motion and affirm the Clerk's taxation
5 of costs. Redbubble would also be happy to provide supplemental declarations and documentation if
6 requested by the Court.

7
8 Dated: February 22, 2022

DURIE TANGRI LLP

9
10 By: /s/ Matthaeus Martino-Weinhardt
MATTHAEUS MARTINO-WEINHARDT

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28 ³ Atari also ignores that Redbubble previously explained this in its reply. *See* Dkt. No. 281 at 5.